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IN THE

Supreme Court of the United States

October Term, 1992

GARY TURPIN AND BETTY TURPIN,
INDIVIDUALLY AND AS PARENT AND NATURAL
GUARDIAN OF BRANDY TURPIN, A MINOR,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Merrell labors mightily to limit the importance of this case by mischaracterizing petitioners' arguments and minimizing the reach of the opinion below. But the Opposition cannot obscure the central question presented by the Petition: Are an expert's conclusions, once ruled admissible as evidence, *themselves* "specific facts" sufficient to forestall summary judgment under Rule 56(e), or may a federal court require *something more*? Nor can the Opposition hide the profound issues raised by the Sixth Circuit's creation of a "hard look" doctrine for expert testimony under Rule 56(e).

Petitioners and several circuits contend that if a party opposes a motion for summary judgment with an admissible expert opinion covering all elements on which that party bears the burden of proof, the plain language and history of Rule 56(e) require a trial on the merits. Merrell and several other circuits disagree, arguing instead that each court is free to subject expert testimony to its own test of veracity before permitting a trial. Nothing in the Opposition refutes or even squarely addresses the existence of this circuit conflict. Because roughly a third of all cases in the federal courts depend on expert testimony,[1] this Court should grant review to resolve the discord among the circuits and clarify the appropriate standard for sufficiency of expert opinions under Rule 56(e). Moreover, so flagrantly does the "hard look" standard violate the Seventh Amendment and the *Erie* doctrine that, quite apart from the circuit split, this Court should grant certiorari to reject the Sixth Circuit's unauthorized overextension of judicial power.

1. Merrell's Assertions That This Case is Fact-Bound, and That Petitioners' Argument Would Necessitate a Trial in Every Case Involving Expert Testimony, are Entirely Without Merit.

Merrell's Opposition is pervaded by two deceptive and inaccurate characterizations of the arguments in the Petition.

First, Merrell claims that the opinion below is restricted in its importance to the "*unique* facts of this one case." (Opp. 16 (emphasis in original)). This claim is flatly untrue, ignoring the new *legal standard* expressly set forth by the decision, which will

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[1] *See* Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. Rev. 1, 1 (1988).

be used in all future cases within the Sixth Circuit for evaluating "technical or specialized" expert testimony, (A6).[2] The court itself noted that "justice and consistency are related ideas" (A1), leaving little doubt that it intends to use its new "hard look" standard to engage in future judicial balancing of expert witness credibility.

Along similar lines, the Opposition cautions that granting review in this case would require "this Court to again review the factual record and again make a finding of facts -- a task the lower courts have twice done before." (Opp. 16-17). Although petitioners readily acknowledge that the courts below engaged in extensive factual analysis, no such detailed examination would be required on this Court's review. Petitioners seek not a review of the parties' factual arguments -- properly a task for the jury on remand -- but instead a review of the *legal standard* used by the court below. Plainly, this Court may determine and articulate the correct legal standard without extensive inquiry into the particular scientific record or specific facts of this case. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1985) (setting forth legal standard under Rule 56 without detailed analysis of the underlying factual record).

Second, the Opposition creates a false dichotomy by transforming petitioners' criticism of the Sixth Circuit's "hard look" doctrine into the unwarranted claim that "[u]nder petitioners' theory of law," summary judgment would be "precluded *whenever* an expert is willing to testify to some factual position" (Opp. 16 (emphasis in original)). Merrell apparently would have this Court believe that there are only two alternatives: either courts are free to fashion from whole cloth their own heightened sufficiency requirements for expert testimony, as did the court below, or "there is no test for sufficiency but only blind and uncritical acceptance." *Id.* This supposed dichotomy is patently false. That petitioners disagree with the Sixth Circuit's legal standard hardly implies that petitioners advocate a construction of Rule 56(e) that would treat any expert opinion as an all-purpose prophylaxis against summary judgment. Indeed, despite Merrell's oft-repeated contention that

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[2] The opinion below is reprinted as Appendix A of the Petition and will be cited herein as (A__). In addition, the D.C. Circuit's opinion in *Ambrosini v. Labarraque*, Nos. 90-7146, 7148, slip. op. (D.C. Cir. June 12, 1992), 1992 WL 126340 (D.C. Cir. 1992), is reprinted as Appendix B of the Opposition and will be cited herein as (B___).

petitioners would require a trial based on "any expert testimony, *however implausible*" (Opp. 12 (emphasis in original)), petitioners advocate no such rule.[3] Indeed, Merrell's misrepresentation of petitioners' position and the decision of the Sixth Circuit below is so persistent that it suggests that Merrell can fathom no legitimate basis on which to oppose the grant of certiorari.

2. Certiorari is Warranted on the Rule 56(e) Issue

Merrell does not dispute the importance of maintaining a uniform standard for determining the sufficiency of expert testimony under Rule 56. Instead, the Opposition simply asserts that "[t]his case presents no issue of intercircuit conflict over the proper summary judgment standard." (Opp. 15). The opinion below tells quite another story, revealing the practical effects of the circuit split over the legal standard for summary judgment under Rule 56(e). The Sixth Circuit emphasized that in cases factually similar to the case at bar, "[f]our federal circuits have held that plaintiffs failed as a matter of law to establish causation of birth defects," (A4), while eight other courts "have either denied or reversed on appeal grants of summary judgment for the defendant." (A5).

Indeed, the court below candidly acknowledged the disagreement among judges as to "how far [courts] should enter the scientific thicket of conflicting inferences in order to determine whether . . . a scientific opinion . . . is sufficiently plausible to allow a jury to ground a verdict on it." *Id.* Thus, contrary to Merrell's claim that this case was "nothing more than" a routine

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[3] For example, where a party's expert wholly fails to state a conclusion concerning an element necessary to that party's case, the mere presence of the expert's affidavit should provide no shield against summary judgment. Thus, if the affidavits of petitioners' experts had concluded only that Merrell's product *generally* possessed the capacity to harm human beings, those affidavits would have been insufficient to require a jury trial on the issue of whether the product caused petitioners' *particular* harms. Instead, however, petitioners' expert, Dr. Palmer, "testified in his affidavit that Bendectin caused [petitioners' injuries]." (A20). Because Dr. Palmer's admissible testimony, if believed by the jury, would have proved all elements necessary for recovery, the court below overstepped the limits of its power and placed itself in conflict with other circuits by declaring petitioners' expert affidavit insufficient. And it is *this* argument, not the overblown caricature painted by the Opposition, that petitioners advance in this Court.

"review of the evidence" (Opp. 15), the Sixth Circuit itself recognized only too well the swirling controversy surrounding the key question it addressed: "*How hard* should judges look at the reasonableness of scientific theories and inferences before they decide whether there is enough to the case for it to go to the jury?" (A6 (emphasis added)). Nothing in the Opposition even remotely demonstrates the absence of a circuit split on this issue.

Instead, the Opposition consists largely of a misdirected response to petitioners' passing suggestion that the "conflict is the product of tension" (Pet. 10), between Rule 56(e) and Fed. R. Evid. 705. *See* (Opp. 9-14).[4] Merrell has confused the *substance* of the circuit conflict with its *origin*. As explained at Pet. 10-11, Rule 56(e) requires the inclusion in a party's affidavits of "specific facts" showing a "genuine issue for trial," while Fed. R. Evid. 705 provides that an expert opinion is admissible "without prior disclosure of the underlying facts or data." Thus, Rule 705 provides for admissibility of an expert's opinion without the presentation of specific facts, but Rule 56(e) requires a showing of "specific facts" to avoid summary judgment. Hence, petitioners contend that there is a tension between these rules,[5] and that such tension perhaps prompted the current circuit conflict.

But the origins of the conflict are in truth only of passing interest. Merrell hardly denies the *existence* of a deep-seated circuit conflict over the proper interpretation of Rule 56(e), and it is that conflict -- *whatever* its origin -- that merits review by this Court. The substance of this conflict is over Rule 56(e) and does not concern the relationship between Rule 56 and Fed. R. Evid. 705;

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[4] Merrell argues that there is no circuit split concerning whether admissible expert opinions are -- simply by virtue of their admissibility -- necessarily sufficient to withstand summary judgment under Rule 56(e). All circuits agree, Merrell notes, that sufficiency and admissibility are distinct legal tests. But petitioners have never argued otherwise. *See* pp. 2-3 & n.3, *supra*. The conflict identified by petitioners consists of the differing standards used by the circuits in determining precisely what a judge may require of an expert's opinion before deciding that it is "sufficient" under Rule 56(e).

[5] Petitioners are not the first to make this observation. *See, e.g.*, *Bulthuis v. Rexall*, 789 F.2d 1315, 1317 (9th Cir. 1985) (per curiam) (noting the "possible tension" between the requirements of Rule 56(e) and the leniency of Fed. R. Evid. 705).

the two rules serve entirely different purposes. Rather, the conflict concerns the meaning of the words "specific facts" in the language of Rule 56(e). Thus the Opposition's analysis (Opp. 12-14) of circuit law is entirely inapposite, as it merely demonstrates that no court has held that there exists "conflict between FRCP 56 and FRE 704 and 705." Opp. 14.

A survey of circuit law *does*, however, reveal two camps diametrically opposed over the meaning of Rule 56(e)'s reference to "specific facts" -- the core of the Petition -- which no amount of obfuscation or verbal gymnastics can avoid.

The first circuit decision squarely to address this issue in the context of expert opinion testimony recognized that under one interpretation, "an expert's conclusion or opinion meets the Rule 56(e) [requirement of] 'specific facts.'" *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981). In other words, an expert's conclusions could *themselves* be considered "specific facts" sufficient to preclude summary judgment. The plain language of Rule 56(e) supports this interpretation,[6] as does the rule's history.[7] Ironically, the strongest statement of this view

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[6] Where the plain language of a procedural rule does not impose specific requirements, this Court has been reluctant to find such requirements implicit within the rule. *See, e.g., Bourjaily v. United States*, 483 U.S. 171 (1987). The issue in *Bourjaily* was whether a coconspirator's statement by *itself* was sufficient to demonstrate the existence of a conspiracy under Fed. R. Evid. 801(d)(2)(E) or whether, instead, a judge could require the prosecution to produce *something more* (independent evidence of a conspiracy). Noting that the plain language of Fed. R. Evid. 801(d)(2)(E) imposed no requirement of independent proof of conspiracy, *see id.* at 178-79, this Court squarely held that a coconspirator's statement *itself* provided enough foundation for the existence of a conspiracy to render the statement admissible under the 801(d)(2)(E) hearsay exemption. *See id.* at 181. Similarly, because Rule 56(e) imposes no independent requirement that an expert's opinion disclose underlying reasoning or analysis, the opinion *itself* satisfies the requirement that a party set forth "specific facts"; the court below was therefore wrong to require *something more*.

[7] Rule 56(e) was specifically promulgated by this Court in 1963 to require the inclusion in a party's affidavits of "specific facts" to show "a genuine issue for trial." This language was added "to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings." *Celotex*, 477 U.S. at 25 (1986). Twelve years later, in 1975, Congress greatly broadened and

comes from the recent D.C. Circuit decision in *Ambrosini* -- the opinion included as Appendix B of the Opposition. *Ambrosini* reversed the trial court's grant of summary judgment against a party offering an affidavit containing *only* the expert's conclusions and a list of sources used to obtain those conclusions. (*See* B16). The D.C. Circuit held that the "affidavit gave a sufficient factual basis to defeat summary judgment at this point." *Id.*[8]

The Ninth Circuit also has held that "[e]xpert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Bulthuis v. Rexall*, 789 F.2d 1315, 1318 (9th Cir. 1985).[9] Likewise, the Tenth Circuit considers it a "truism" that "'an expert's opinion or interpretation of evidence is itself evidence.'" *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 338 (10th Cir. 1991) (citation omitted). Thus, the Ninth, Tenth, and D.C. Circuits have directly held that an expert's conclusions are *themselves* sufficient to satisfy the "specific facts" language of Rule 56(e) and thereby preclude summary judgment.

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liberalized the role of expert testimony in the federal courts by enacting the Federal Rules of Evidence. Fed. R. Evid. 705 provides that an expert's testimony is admissible "without prior disclosure of the underlying facts or data." Reading Fed. R. Evid. 705 in light of Rule 56(e), Congress must have believed that an expert's conclusions would generally constitute "specific facts" sufficient to survive summary judgment; if Congress had not thought so, there would have been little point in vastly expanding the admissibility of expert testimony only to have that testimony discarded by the courts before it reached the jury.

[8] These are the exact circumstances of the instant case; Dr. Palmer opined that Merrell's drug had caused petitioners' injuries, and he listed the sources upon which he relied. *See* (A20-A21). The one difference, of course, is that the Sixth Circuit, unlike the D.C. Circuit, upheld the grant of summary judgment.

[9] The *Bulthuis* decision represented a turning point for the Ninth Circuit, essentially reversing that Circuit's position, enunciated in *United States v. Various Slot Machines*, *supra*, 658 F.2d at 700, that "in the context of a summary judgment the expert must back up his opinion with specific facts."

In sharp contrast, the court below and several other circuits have required *something more*. In *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985), for example, the Eleventh Circuit rejected the affidavit of an expert automotive engineer concerning an automobile accident because the affidavit "fail[ed] to provide specific facts to back up its conclusory allegations." *Id.* at 986. The Seventh Circuit found insufficient a banking expert's affidavit even though "he examined materials produced in discovery and drew inferences from the record," simply because the expert spoke "in legal rather than economic terms." *Mid-State Fertilizer v. Exchange Nat. Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989).

Other circuits have selectively imposed higher burdens depending on the content of an expert's opinion. The most egregious example is the Fifth Circuit's decision in *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir. 1989), in which the court singled out toxic tort cases as requiring greater judicial scrutiny of expert testimony. Indeed, the court held that, without a statistically significant epidemiological study demonstrating causation, no expert's opinion that Bendectin causes birth defects could survive summary judgment. *See id.* at 315. Thus did the Fifth Circuit use judicial fiat to erect a nearly insurmountable barrier foreclosing trial for an entire class of claimants.[10] Finally, of course, the Sixth Circuit singled out expert testimony containing "technical or specialized matter" for "enhanced 'judicial vigilance.'" (A6-A7 (citation omitted)). Applying a doctrine derived from administrative law, the court below took a "hard look" at petitioners' expert affidavits and concluded that even though petitioners' experts had supplied specific conclusions and a list of

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[10] Even more disturbing is that "the *Brock* court was flat wrong," because using "statistical significance as a screening device to avoid sampling error is inconsistent with the preponderance-of-the-evidence standard." Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 Nw. U. L. Rev. 643, 667-68 (1992). *Brock*'s reasoning here as been widely criticized; indeed, even the court below rejected *Brock*'s exclusive focus on epidemiology, noting that "[a]nimal studies often comprise the backbone of evidence indicating biological hazards." (A21). The *Brock* opinion thus provides a poignant illustration of the dangers of allowing judges untrained in the sciences the freedom to require *something more* in determining the sufficiency of expert opinions.

their underlying (concededly valid) data, the *judges* felt that such opinions, in themselves, were insufficient. Clearly, the Sixth Circuit was requiring *something more* of petitioners' experts.

Merrell has not denied and cannot deny the glaring rift between the circuits demonstrated by these cases. Quite simply, an expert affidavit sufficient to guarantee a trial on the merits in the Ninth, Tenth, and D.C. Circuits may result in summary judgment for the defendant if offered to a federal court in the Fifth, Sixth, Seventh, or Eleventh Circuits. This situation is clearly intolerable and this Court should grant certiorari to resolve the conflict and articulate clearly the correct standard under Rule 56(e).

3. Certiorari is Also Warranted on the Inherent Judicial Power Issue

The Sixth Circuit's "hard look" doctrine, which allows the court to "judge for itself the validity of the reasoning process by which various competing qualified experts have reached their conclusions" (A1), plainly exceeds the outermost boundary of inherent judicial power. Petitioners recognize the Sixth Circuit's laudable desire to conserve limited judicial resources. Nevertheless, judicial economy may not be achieved at the cost of ignoring the Seventh Amendment or this Court's long-established *Erie* jurisprudence. The doctrine enunciated by the court below must therefore be rejected as "an impermissible means to a noble end." *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988).

Merrell does not contest that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inference from the facts are jury functions." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Merrell does not even *attempt* to justify the intrusion of the court below into the province of the civil jury.[11]

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[11] The Opposition offers no direct defense of the Sixth Circuit's unwarranted encroachment on the function of the jury and does not cite to the Seventh Amendment in attempting to defend the "hard look" standard. Rather, Merrell claims that the court below simply corrected its prior practice of treating expert testimony with special deference, pronouncing that henceforth expert opinions will be held to "the *same* standards of reliability and sufficiency as other evidence." (Opp. 15). Analysis of the opinion below, however, quickly belies this claim. The Sixth Circuit itself opined that where judges find "a 'combination of danger signals,'" (A7

Petitioners' qualified expert offered straightforward, admissible conclusions concerning causation. The "legal value" of the types of studies he relied upon "has been recognized by federal courts and agencies." (A21). Juries have been persuaded that Merrell's product causes the type of harms suffered by petitioners,[12] and courts have upheld such verdicts on review.[13] The court below even went so far as to acknowledge its own "difficulty . . . in knowing what reasonable inferences of causation to draw" from the studies relied on by petitioners' expert. Such circumstances -- presenting complex expert testimony with the outcome hinging on the credibility of each parties' experts -- are a paradigmatic case for jury determination.

Nevertheless the court below short-circuited the jury system, using Rule 56(e) as a tool to resolve the case quickly and in a way that would ensure consistency in future cases. After reviewing the evidence, the court below pronounced simply that petitioners' expert had stated "no understandable scientific basis" (A21), for his opinion. In effect, even though Dr. Palmer was an expert and even though he had relied on the appropriate data and analysis, the court did not *understand* how he arrived at his conclusion and therefore chose not to *believe* that conclusion.

Such an approach is a direct affront to the Seventh Amendment. This Court has recognized that "juries may tend to reach disparate outcomes based on the same instructions." *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1055 (1991) (Kennedy, J.,

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(citation omitted)), they are to exercise "*enhanced* 'judicial vigilance.'" *Id.* Clearly then, the court below mandated heightened scrutiny where expert witness testimony involves "technical and specialized matter." (A7). But such scrutiny -- also known as evaluation of *credibility*, or deciding whom to believe -- is precisely the constitutionally defined duty of the jury.

[12] *See, e.g., Havner v. Merrell Dow Pharmaceuticals, Inc.*, Texas 214th Judicial Ct., No. 88-3915-F, Final Judgment (reprinted at Pet. App. A41-A43). The *Havner* jury chose to believe the opinion of Dr. Palmer -- petitioners' expert in this case -- that the injuries there alleged were caused by Bendectin. *Havner* thus dramatically illustrates that the *ad hoc* standards created by the Fifth and Sixth Circuits for evaluating expert testimony result in conflicting outcomes in similar cases, depending solely on whether the cases are brought in state or federal court. *See* Pet. 21.

[13] *See Oxendine v. Merrell Dow Pharmaceuticals*, 506 A.2d 1100, 1104 (D.C. 1986), 563 A.2d 330 (D.C. 1989), *cert. denied*, 493 U.S. 1074 (1990).

concurring in judgment). Nevertheless, the Constitution provides that it is the office of the civil jury "to sort out the true testimony from the false . . . and, when called upon to do so, to give greater credence to one party's expert witnesses than another's." *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983) (internal quotation marks omitted). This case thus presents a clear opportunity for this Court to reaffirm the central command of the Seventh Amendment and its role in checking the power of the Federal Judiciary.

Finally, the "hard look" standard embraced by the court below flatly ignores the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). *Erie* teaches that federal courts sitting in diversity must respect state substantive law. The Sixth Circuit, however, chose to sacrifice Kentucky's carefully considered tort law in favor of achieving consistency in cases tried in the federal courts. Without a single citation to the underlying state substantive law, the court below used Rule 56(e) as a blunt instrument to preclude a trial not only in this case but also in all factually similar cases arising under the laws of Kentucky, Ohio, Michigan, and Tennessee. In so doing, the Sixth Circuit has guaranteed that the substantive rights of similarly situated litigants will turn simply on whether their cases are heard in state or federal courts.

This is precisely the result that *Erie* aims to avoid. Merrell offers no defense of the Sixth Circuit's decision on this ground; indeed, it does not even deny that petitioners would have been permitted a trial on the merits if this case had been in state court. The "hard look" doctrine thus effects inequitable administration of the laws *and* creates an incentive for forum-shopping, violating both of the "twin aims" of this Court's long-established *Erie* doctrine. *See Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2137 (1991).

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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